ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION III

CACR06-745

MAY 16, 2007

ROBERT S. SZLEMKO APPELLANT	APPEAL FROM THE BOONE COUNTY CIRCUIT COURT [NO. CR05-64-4]
V.	HON. GORDON WEBB, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Robert Szlemko entered a conditional plea of guilty to three counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child, a Class C Felony. He appeals, arguing that the trial court erred in denying his motion to suppress evidence seized in his place of work and his home. For the reasons set forth herein, we affirm.

In the early morning hours of January 21, 2005, Officer Matt Whisenant of the Harrison Police Department was on patrol when he noticed a pickup truck parked in the drive-thru lane behind the closed Baskin Robbins. Officer Whisenant testified that, because there had been a series of break-ins in the past several months, he went to investigate. He saw no exterior lights and only a minimal light inside the drive-thru window. As he pulled up to

the window, he noticed that the light emitted from a computer screen. Officer Whisenant saw several pictures of young girls flashing across the screen in a slide-show manner. He testified that, in one of the pictures, he saw two topless girls who appeared to be eight years old or younger in a bathtub. As Officer Whisenant pulled his car forward, he noticed appellant seated behind the computer. After Officer Whisenant shined his spotlight on the drive-thru window, appellant opened the window, stood up, partially blocking the computer screen, and asked the officer if everything was alright. Officer Whisenant responded, "No, everything is not alright. I can see what you were looking at on the computer." He also told appellant not to touch the computer and that a supervising officer was on his way. Appellant explained to Officer Whisenant that the pictures were merely modeling photos.

When Corporal Nathan Jenkins arrived and saw the pictures through the drive-thru window, he asked if he and Officer Whisenant could "come in and talk." Appellant said "yes" and unlocked the door to let them in. Appellant was read *Miranda* warnings as soon as the officers entered the store. Appellant asked them if they wanted anything to drink and told them that he was the owner's son and was working late. He then offered to show the officers the rest of the pictures, explaining that they were just modeling photos and that there was nothing wrong with the pictures. After the officers noticed appellant closing two of the pictures that were on the screen, Corporal Jenkins asked appellant to step away from the computer. Appellant then told the officers that he would show them the rest of the pictures. He showed them how to look at the pictures and advised Corporal Jenkins that he could go through them himself.

As Corporal Jenkins sat down in front of the computer and began going through the pictures, appellant grabbed a magazine from a shelf above the computer and started flipping through it, not stopping at any page. Officer Whisenant testified that appellant then placed the magazine in another place on top of a manila folder. Officer Whisenant reached for the folder and asked appellant what was in it, and appellant grabbed the folder and did not reply. When Corporal Jenkins asked him what was in the folder, appellant said it was "inappropriate," opened the folder, and began to thumb through the pictures in the folder. While appellant was flipping through the folder, the officers saw photos of nude young girls.

Corporal Jenkins then called Detective Gilbert Neal, who arrived forty minutes later. When he arrived, Detective Neal spoke with the officers at the scene and looked at the contents of the manila folder. He asked appellant if he had any other pictures at his house and if he would care if they checked his house. Appellant said he had "no problem with that" and signed a consent form for the officers to search his house. Because appellant was so cooperative, Detective Neal said that they allowed him to close the business, shut down as he normally did, and drive himself in his own car to his house. Detective Neal took the computer and the manila folder.

Appellant was charged with three counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child. He filed a motion to suppress the physical evidence, which the trial court denied after a hearing. The trial court found that the initial entry by the officers into Baskin Robbins was consensual, that the computer pictures and manila folder were properly seized under the plain-view doctrine, and that the search of

appellant's home was consensual. Appellant entered a conditional plea of guilty pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure and was sentenced to five years' imprisonment. He appeals from his conviction and sentence, arguing that the trial court erred in denying his motion to suppress.

Appellant's first argument is that the trial court erred in denying his motion to suppress because he did not give consent for a search of the business and the items seized were not in plain view. The State contends that appellant consented to the officers' entry into Baskin Robbins and that the items were in plain view. When we review a trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Brazwell v. State*, 354 Ark. 281, 284, 119 S.W.3d 499, 500 (2003).

The plain-view doctrine may be used to uphold a warrantless seizure of items where, first, the officers were lawfully located in a place to plainly view the object and, second, the object was in plain view and its incriminating nature was immediately apparent. *Fultz v. State*, 333 Ark. 586, 593, 972 S.W.2d 222, 224–225 (1998). Appellant argues that his consent to the officers' entry into Baskin Robbins was not freely and voluntarily given and, therefore, that the officers were not lawfully in Baskin Robbins. Consequently, he claims that the seizure of the computer and manila folder must be suppressed. Specifically, appellant contends that the officers were in their uniforms, shined a light into the drive-thru window, and asked him questions about what he was doing. Appellant argues that a reasonable person in

appellant's position would not have felt free to refuse to allow the officers to enter the store and that, therefore, his consent was not freely and voluntarily given.

Appellant claims that the officers' entry into Baskin Robbins amounted to a "search or seizure." He cites Rule 10.1(a) of the Arkansas Rules of Criminal Procedure, which defines "search" as follows:

> any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States of this state.

An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search. Ark. R. Crim. P. 11.1(a). Rule 11.1(b) requires the State to prove by clear and positive evidence that consent to a warrantless search was freely and voluntarily given and that there was no actual or implied duress or coercion. The Supreme Court of the United States has held that the test for a valid consent to search is that the consent be voluntary, and "[v]oluntariness is a question of fact to be determined from all the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 248–49 (1973)).

We turn to the circumstances present in this case. Only two witnesses testified at the hearing on appellant's motion to suppress: Officer Whisenant and Detective Neal. Officer Whisenant testified that he remained in his car until Corporal Jenkins arrived and did not talk with appellant while he waited. He also said that when Corporal Jenkins arrived, Corporal Jenkins asked appellant if he and Officer Whisenant could "come in and talk." Officer

Whisenant testified that appellant, appearing eager to explain himself, unlocked the door and even offered soft drinks to the officers. Both Officer Whisenant and Detective Neal testified that appellant was very cooperative. Appellant did not produce any evidence that the actions of the officers were threatening. We hold that the circuit court's finding that appellant consented to the officers' initial entry into Baskin Robbins was not clearly erroneous. Therefore, the officers were lawfully inside the store at the time the evidence was seized.

When police officers are legitimately at a location and acting without a search warrant, they may seize an object in plain view if they have probable cause to believe that the object is either evidence of a crime, fruit of a crime, or an instrumentality of a crime. *Fultz*, 333 Ark. at 593, 972 S.W.2d at 224–25 (citing *Arizona v. Hicks*, 480 U.S. 321 (1987)). Even if the police did not inadvertently discover the object, the seizure does not violate the Fourth Amendment. *Id.* (citing *Horton v. California*, 496 U.S. 128 (1990)). In this case, the officers had already seen several photos on the computer from the drive-thru window suggesting that the computer contained evidence of a crime. Moreover, the officers testified that, when they came inside, appellant allowed Corporal Jenkins to sit down at the computer and showed him how to view the photos. We hold that the trial court's determination that the officers' seizure of the computer fell within the plain-view doctrine was not clearly erroneous.[1]

Further, while the officers were in the store, appellant grabbed the folder and began flipping through it where the officers were able to see pictures of nude young girls. Appellant

[1]We note that the computer itself was subsequently searched pursuant to a search warrant.

claims that his actions with regard to the folder—in refusing to give the folder to the officers and in responding to Corporal Jenkins by indicating that the pictures were "inappropriate"—suggested that he did not want the officers to view the contents of the folder. However, we note that he *chose* to thumb through the folder, which allowed the officers to view some of the pictures. The rationale behind the plain-view doctrine is that the observation of items in plain view is not a search. *Williams v. State*, 327 Ark. 213, 219, 939 S.W.2d 264, 267 (1997). Once an officer's activity crosses the line from observation to a probing quest for evidence, a search has begun, and the realm of the plain-view doctrine is left behind. *Id.* In *Williams*, our supreme court held that drugs and drug paraphernalia were not in plain view because they were not discovered through mere observation. The items in *Williams* were discovered when the officer moved a bag of cookies and opened a desk drawer.

In this case, the officers were not probing for evidence when they saw the pictures. Appellant was holding the folder and flipping through the pictures in full view of the officers. According to the officers' testimony about the pictures they saw, they had probable cause to believe that the pictures were either evidence of a crime, fruit of a crime, or an instrumentality of a crime. We hold that the circuit court's finding that the manila folder was properly seized under the plain-view doctrine was not clearly erroneous.

Appellant also argues that the illegal search and seizure in Baskin Robbins tainted the search of his home. Because we uphold the seizure of the items in Baskin Robbins, we do not address this argument.

Affirmed.

PITTMAN, C.J., and GRIFFEN, J., agree.